IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

CHRISTINE WARCZAK, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

On Appeal From the Court of Appeals of Michigan

BRIEF FOR APPELLEES

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COUNTER-STATEMENT OF THE CASE

1. *The Complaint*

On November 7, 1969, plaintiff Warczak and various other named teachers filed a complaint for declaratory

relief, challenging the constitutional and statutory validity of the agency shop provision in the collective bargaining agreement between the Detroit Board of Education, their employer, and the Detroit Federation of Teachers (sometimes hereinafter, the Union).[1] The Federation is their statutory bargaining representative.[2] Plaintiffs purported to file the action on behalf of themselves and all others similarly situated (A. 7); they named as defendants the Board, the Federation, the Federation's officers and (as a purported class) all fellow teachers who were members of the Federation. At the time the suit was filed the agency shop clause of the contract was not in effect and was not scheduled to go into effect until January 26, 1970. (A. 9) Nevertheless, although no service fee monies had yet been collected, plaintiffs alleged "that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used" for the support of

[1] "A. All employees, employed in the bargaining unit, or who became employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members. This provision is effective Monday, January 26, 1970. * * *" (A. 9)

[2] The Federation was initially accorded exclusive recognition after a school-board sponsored representation election in 1964, prior to Michigan's adoption of the Public Employment Relations Act (PERA) in 1965. Later the Federation was certified as exclusive bargaining agent by the Michigan Labor Mediation Board (now called Michigan Employment Relations Commission) under Section 11 of PERA, Michigan Compiled Laws Annotated (hereinafter MCLA) 423.211, Michigan Statutes Annotated (hereinafter MSA) 17.455(11), following its prevailing in a secret ballot election under the auspices of the Labor Board on April 19, 1967. The majority status of the Federation has not since been questioned.

unspecified "activities and programs which are economic, political, professional, scientific and religious in nature of which plaintiffs do not approve." (A. 14) Alleging that the required payment of the agency shop fee deprived them of freedom of association and other rights under "the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments and their penumbras" and various Michigan constitutional and statutory provisions, plaintiffs asked a declaratory judgment that the agency shop clause is invalid. (A. 13) They did not seek injunctive relief against *expenditures* of such monies, nor seek any rebates or limitations on payments for portions which might be spent for political causes.

2. *The Course of the Litigation*

Defendants moved to dismiss on the pleadings for alleged failure of plaintiffs to state a claim upon which relief could be granted. Holding that "the agency shop provision is not repugnant to any statute or constitutional provision," the Wayne Circuit Court granted the motion. (A. 29, 35)[3] On appeal, the Michigan Supreme Court on December 28, 1972, vacated the dismissal order in *Warczak* (A. 59) and remanded the case to the Circuit Court for further proceedings consonant with the intervening decision in *Smigel* v *Southgate Community School District*, 388 Mich 531, 202

[3] Contrary to appellants' contention, defendants' motion under Michigan practice did not admit even for purposes of the motion plaintiffs' legal conclusions or unwarranted factual deductions. *Prawdzik* v *Heidema Brothers, Inc*, 352 Mich 102, 109, 110, 89 NW 2d 523 (1958); *Koebke* v *LaBuda*, 339 Mich 569, 573, 64 NW 2d 914 (1954); *Dodge* v *Detroit Trust Co*, 300 Mich 575, 595, 596, 2 NW 2d 509 (1942); *Plassey* v *S. Loewenstein & Son*, 330 Mich 525, 528-529, 48 NW 2d 126 (1951) (pleaded anticipated wrongs held mere anticipatory conclusions). Cf. Federal Rule 12(b)(6), 2A Moore's Federal Practice ¶12.08, 2266-2269 and note 4. "For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."

NW2d 305 (1972), which had held that for statutory reasons (the want of express authorization therefor) an agency shop provision was prohibited under Section 10 of the Public Employment Relations Act.

In the meantime, on April 23, 1970, after the original Circuit Court dismissal of *Warczak*, a new suit had been filed by Warczak's counsel for Abood and other teachers. Although making substantially identical allegations to those in the *Warczak* complaint, the *Abood* plaintiffs did not purport to bring a class action (though they purported to be part of the original *Warczak "class"*). They sought similar declaratory relief, and an injunction against their discharge under the agency shop clause. Like the *Warczak* plaintiffs, they did not seek to restrain expenditure of any monies collected, nor claim any sort of rebate, nor identify any specific causes to which they objected.[4]

After the Michigan Supreme Court had remanded in

[4] Contrary to the contention in their brief (p. 4) that they number "several hundred", or in their earlier Jurisdictional Statement (p. 7) that they number "600", *Abood* and *Warczak* appellants together constitute at most a few dozen employees in this 11,000 employee bargaining unit. According to appellees' records, 167 of the named Warczak and 162 of the named Abood plaintiffs are not even in the bargaining unit (Warczak: no record of employment, 10; deceased, 7; terminated, 14; supervisors, 13; retired, 75; resigned, 31; released, other than "terminated", 8; on leave, 9. Abood: no record of employment, 18; deceased, 6; terminated, 12; supervisors, 12; retired, 51; resigned, 45; released, other than "terminated", 10; on leave, 8). Of the remaining number, despite a stay of enforcement contained in the agency shop clause itself (see n. 6, *infra*), 128 Warczak and 131 Abood plaintiffs elected to become (or remain) *members* of the Federation, 35 Warczak and 27 Abood plaintiffs are paying agency shop fees (some "under protest"), and only 11 Warczak and 9 Abood plaintiffs are doing neither. Those who are in the bargaining unit who are making payments "are of course in the entirely different position of voluntary or acquiescing dues payers, which they have every right to be, and . . . the decree in this case should not affect them." Black, J., in *Machinists* v *Street*, 367 US 740, 794-795 (1961) (dissenting on other grounds).

Warczak but before any further action was taken by the Circuit Court in either case, the Michigan legislature amended Section 10 of PERA on June 14, 1973, by Public Act 25 of 1973, to authorize expressly agency shop agreements requiring public employees to pay service fees: "* * * nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Section 10(1)(c) (proviso), MCLA 423.210(1)(c), MSA 17.455(10)(1)(c). The legislature stated the purpose of the amendatory act to be to "reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Sec. 10(2), MCLA 423.210(2), MSA 17.455(10)(2).

Upon enactment of the amendment, defendants renewed their motions to dismiss, and the trial judge granted the motions in both *Warczak* and *Abood*. Plaintiffs appealed to the Michigan Court of Appeals.

3. *The Ruling Below.*

Plaintiffs' appeal to the Michigan Court of Appeals urged two principal contentions which are presently before

this Court. First, they contended that the very concept of compulsory financial support to the union which is their statutory bargaining representative violates the Federal Constitution. In addition, and in support of their basic claim, they contended that their required payments to the union are or may be used for political purposes. With respect to the second point, they cited no particular political expenditures to which they were opposed;[5] and while some of them had commenced paying service fees (see *supra*, n. 4) they were not, pending litigation, under any compulsion to do so.[6]

The Michigan Court of Appeals rejected the plaintiffs' direct attack on the concept of compulsory financial sup-

[5] Appellants' so-called "offer of proof" (brief, 5) had added nothing. First, it was not part of the record below; under Michigan practice, on a motion to dismiss for failure to state a claim, only the challenged pleading and not affidavits tendered in support or opposition to the motion may be considered. *Chatham Super Markets, Inc* v *Ajax Asphalt Paving, Inc*, 370 Mich 334, 121 NW2d 836 (1963); *Drouillard* v *City of Roseville*, 9 Mich App 239, 156 NW2d 628 (1967); *Todd* v *Biglow*, 51 Mich App 346, 214 NW2d 733 (1974). Second, having been filed like the original complaint prior to the effective date of the agency shop clause, it could not credibly represent in the present tense "that a substantial part of the sums required to be paid under said agency shop clause are used" for purposes to which the plaintiffs assertedly objected. Third, contrary to appellants' brief (p. 6), the "offer of proof" would have been legally insufficient in any event, because not supported by competent affidavits of personal knowledge in compliance with the applicable Michigan court rule, GCR 116.4. And finally, the "offer of proof" was virtually as vague and general as the complaint itself; in fact, the supporting affidavit equivocally asserted that the Federation's revenues are "devoted to political and social [sic] purposes of which I do not *necessarily* approve." (A. 25, emphasis added).

[6] The agency shop clause itself contained a provision (¶B, A. 10) staying enforcement against those employees engaged in its litigation, pending resolution of such litigation. Under such provision, expansively construed by appellee Board, no enforcement action has been taken by the Board against *Abood* and *Warczak* plaintiffs who have paid neither dues nor service fees to date. Thus no appellant has yet been compelled to pay any money to the Union.

port. The Court relied chiefly upon this Court's decision in *Railway Employes' Department* v *Hanson*, 351 US 225 (1956), for the conclusion that Michigan may require all public employees who are represented in statutory collective bargaining and who benefit therefrom to share in its costs. (A. 100) As concerns plaintiffs' alternative claim of forced political contributions, however, the Michigan Court of Appeals upheld their basic claim to be free from compulsory support of political expenditures. The Court, quoting the concurring opinion of Mr. Justice Douglas in *Street*, concluded that if the required agency shop payments included political expenditures they "could violate plaintiffs' First and Fourteenth Amendment rights." (A. 102) The Court accordingly analyzed alternative remedies reviewed in this Court's *Street* decision, and expressed its preference for the remedy of "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." (A. 103-104) The Court noted that such remedy "will least interfere with unions carrying out their daily functions."[7] (A. 104)

The Court, however, declined to grant any specific relief to plaintiffs concerning expenditures for political purposes, on the ground that such relief was premature. On this score the Court ruled as follows:

> "To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining

[7] Appellants assert that the Court of Appeals found that the legislature "intended" the coerced political use of service fee payments. We disagree. The Court of Appeals having expressly required rebates covering political expenditures appropriately objected to by any dissenting employees, and the defendants having accepted that Court's decision, that is the governing state ruling before this Court.

representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.

In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore the plaintiffs are not entitled to relief on this basis." (A. 104)

Following this ruling, an appeal taken by plaintiffs and a cross-appeal on an unrelated issue by defendants were denied by the Michigan Supreme Court because "appellants have failed to persuade the Court that the questions should be reviewed by this Court." (A. 124) This Court subsequently noted probable jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants advance two separate but interwoven attacks on the requirement, authorized by the Michigan statute and imposed by the contract with the Detroit School Board, that they give financial support to the Union which represents them in collective bargaining and grievance negotiation. On the one hand, they frontally challenge the requirement that they contribute to the costs of the statutory bargaining process which yields them employment benefits (Question I). On the other, they seek to bolster that attack with a claim that their payments will or may be used for political expenditures by the Union, to which expenditures they object (Question II). But it is clear that, once they commence paying, appellants' dues cannot and will not be used by the Union for political activities. We so demonstrate in Point I. Thereafter in Point II of the Argument we show that the Constitution does not preclude the "agency shop" compromise, which requires each employee to share in the costs of the bargaining process without requiring him to become a member of the union.

In that respect it is of crucial significance that only last term this Court repeatedly recognized the broad discretion of states to determine and limit the terms and conditions of their own public employment. Michigan, like some one-third of the States, has merely conformed in its own labor relations to the same cost-sharing principle adopted by the Congress in federal labor relations, which was upheld by this Court in *Hanson* against First and Fifth Amendment objections. That rule is no less appropriate in public employment than in the private sector. The collective bargaining pattern of the federal statutes has been adopted by most of the states in their own public employment; and the public sector process is functionally like that in the private sector, and equally beneficial to all employees required to share its costs. Moreover, appellants' First Amendment attack on the cost-sharing principle is repelled by this Court's rulings recognizing that public employees cannot claim unrestricted rights of association or abstention in areas of justified public and governmental interests.

ARGUMENT

I

APPELLANTS' AGENCY SHOP PAYMENTS WILL NOT INCLUDE UNION EXPENDITURES WHICH WOULD VIOLATE ANY FIRST AMENDMENT RIGHT OF ABSTENTION FROM POLITICAL ACTIVITY.

Appellants have not yet been required to pay any agency fees under the statute and contract here involved. They

nevertheless assert that once their payments commence, the Michigan court has permitted their use for Union political activities in violation of appellants' First Amendment right to abstain from political activities and contributions. But whereas appellants would treat the ruling below as a rejection of the dissenter's right to withhold support to union political expenditures, in fact the ruling below squarely upholds that right. Thus, the Michigan Court of Appeals' opinion stated that because the Michigan statute did not expressly provide for a political expenditures exception—which this Court's decision in *Machinists* v *Street*, 367 US 740 (1961) found implicit in the Railway Labor Act —the statute "could violate plaintiffs' First and Fourteenth Amendment rights." (A. 102) To avoid such violation, and recognizing that those required to pay service fees "may not be deprived of First Amendment freedom of expression" (A. 104), the Michigan court went on to discuss the alternative remedies suggested in the *Street* opinion. It stated its approval of the remedy of "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." (A. 103-104) Under this ruling it is perfectly clear that the applicable Michigan rule is now the same rule this Court announced and applied in *Street* and in *Railway Clerks* v *Allen*, 373 US 113 (1963), and it clearly bars the political use over their objection of appellants' agency shop payments.[8]

[8] Appellants argue that the Michigan statute, even as above construed to assure that objecting public employees need not support political activities with which they disagree, is unconstitutionally overbroad. But this contention is nothing more than a reformulation of the freedom of association argument advanced and rejected in *Hanson*. The point established by *Hanson, Machinists* v *Street*, 367 US 740 (1961), and *Railway Clerks* v *Allen*, 373 US 113 (1963), is that a statute which provides for required dues or fees payments is constitutional so long as employees who give proper notice of their objection are personally relieved of the obligation to finance political activities with which they disagree; but that they are not entitled to interfere with dues or fees obligations, or with expenditures generally. That is exactly how the Michigan courts have interpreted the Michigan statute and the construction of that statute by the state courts is dispositive. "We accept without question [the state court's] view of the statute's meaning, as of course we must. [The] authoritative interpretation by the [State] Supreme Court 'puts these words in the statute as definitely as if it had been so amended by the legislature.'" *Cramp* v *Board of Public Instruction*, 368 US 278, 285 (1961).

Moreover, the right recognized by Michigan is now also recognized and preserved by the governing rules and bylaws of the Union itself, applicable to all members and dues payers, including these petitioners. In bylaws recently adopted, the Federation provides an administrative rebate procedure to political objectors which conforms with this Court's suggestion in *Allen* (at p. 122). See Appendix B, *infra*. Under the procedure, the dissenting employee may simply protest at the start of each school year the expenditure of any part of his agency shop fee for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." The Federation is obliged to ascertain the portion of its expenditures for such purposes, and to make a *pro rata* refund to the objector. A review procedure, including terminal review by an impartial board, is provided to the objecting employee.

Thus, both the governing law of Michigan and the governing bylaws of the Union give assurance that when appellants commence their agency fee payments they will not be required to pay for union political activities.

However, appellants object that under the ruling below an employee must first make his objection known to the

Union in order to perfect his dissenter's right of abstention. But it is recognized by this Court's rulings in *Allen* (at p. 118, n. 5) and *Lathrop* v *Donohue*, 367 US 820, 845-848 (1961), that the notice required for invocation of a *constitutional* objection to political expenditures may be greater than that for invocation of the federal *statutory* limitations recognized by *Street*. Nothing in *Street* suggests that state courts may not require prior protest to the union as a prerequisite to invocation of judicial relief, or casts doubt upon "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v *Bethlehem Shipbuilding Corp*, 303 US 41, 50-51 (1938). Appellants, like other state court litigants, must pursue their remedies in the manner that state law prescribes for the vindication of their rights, and no federal question is raised in the absence of such pursuit. See *e.g.*, *Lathrop* v *Donohue*, 367 US 820, 845-848 (1961); *Mellon Co* v *McCafferty*, 239 US 134 (1915); *Herb* v *Pitcairn*, 324 US 117 (1945); *Copperweld Steel Co* v *Industrial Commission*, 324 US 780 (1945); *Woods* v *Nierstheimer*, 328 US 211 (1946); *Edelman* v *California*, 344 US 357 (1953); *Brown* v *Allen*, 344 US 443 (1953).

In *Hanson*, as here, the dues payment obligation was directly under attack, but this Court declined a premature resolution concerning political expenditures from dues. 351 US at 238. Only when the expenditure question was concretely presented in *Street* did this Court resolve it. Here Michigan courts have merely followed this Court's lead, declining in a suit challenging the agency shop (and, like *Hanson*, filed before the provision was even in effect) to grant relief against political expenditures from fees appellants have not yet paid and the Union has not yet spent.

Here both Michigan and the Union have provided fair and adequate protection to appellants against the political use of their dues payments once they have made proper objection to such use. There is thus no issue of political expenditures in this case.[9] What remains is appellants' broader claim that they may not be legally required to share in the costs of the bargaining process in which the Union, pursuant to law, engages on their behalf and to their benefit. We turn now to that central question.

II

THE STATES IN THE CONTROL OF THEIR OWN LABOR RELATIONS MAY PROPERLY REQUIRE ALL EMPLOYEES WHO BENEFIT FROM EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATION TO SHARE ITS COSTS, FOR LABOR RELATIONS STABILITY, AND AS A JUSTIFIED COMPROMISE BETWEEN THE BURDENS OF COMPULSORY MEMBERSHIP AND THE INEQUITIES OF REPRESENTATION WITHOUT TAXATION.

Apart from appellants' unfounded claim that the decision below subjects them to coerced support of union political expenditures, they advance a more fundamental attack upon the requirement that they provide financial support to the union which is their statutory bargaining representative. Appellants would evade or erode the principle, long ago adopted by the Congress and upheld by this Court, which requires "the beneficiaries of trade unionism to contribute to its costs". *Railway Employes' Department* v *Hanson*, 351 US 225, 235 (1956). They claim that the First

[9] Appellants advance an alternative and quite different political expenditures argument to the effect that collective bargaining for public employees is inherently "political" in character. Since that claim is advanced as part of appellants' broader attack on the concept of compulsory fees in public employment, we address it hereafter (p. 35) in the analysis of appellants' efforts to distinguish and avoid the *Hanson* ruling.

Amendment forbids requiring public employees to support the costs of collective bargaining which a union carries on, *and by law must fairly carry on,* for all the employees.

We proceed to demonstrate the multiple fallacies in appellants' extravagant claim. In Section A we review numerous recent decisions of this Court which recognize broad state discretion to set the terms and conditions of public employment. We demonstrate in Section B that this Court upheld in *Hanson,* and perfected in *Street* and *Allen,* the basic rule that employees who are beneficiaries of the statutory collective bargaining system may be required to share in its costs. In Section C we show that the agency shop—a compromise between the burdens of compulsory union membership and the inequities of representation without taxation—is equally justified in public employment. Finally, in Section D we show that requiring each employee to give pro-rata support to the costs of collective bargaining does not constitute forced "association" within the meaning of the First Amendment, and in any event meets the Amendment's requirements.

A. This Court's Recent Decisions Recognize the States' Broad Discretion to Set the Terms and Conditions of Their Public Employment.

A series of significant decisions in the term just concluded upholds against constitutional attack the broad authority of public employers to control their own labor relations. These decisions, especially when coupled with *Hanson* (Part B below), foreclose appellants' claims. For they flatly repudiate what would have to be plaintiffs' indispensable propositions to distinguish *Hanson:* (1) that the Constitution more strictly limits the power of the states to set the terms of their own employees' employment relations than it limits the ability of Congress to make policy judgments regarding labor relations generally; and (2) that public employees have constitutional rights greater than those of citizens generally.

Thus, in *National League of Cities* v *Usery,* — US —, 44 LW 4974 (1976), the Court declared unconstitutional the minimum wage and overtime provisions of the 1974 amendments to the Fair Labor Standards Act, for intrusion upon what were held to be the sovereign powers of the states. "One undoubted attribute of state sovereignty," the Court said, "is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." 44 LW 4977. Concluding that these determinations are functions essential to the states' " 'separate and independent existence,' " this Court held that Congress was without authority to "abrogate the States' otherwise plenary authority to" deal with these matters. 44 LW 4977.

Hortonville Joint School District v *Hortonville Education Association,* — US —, 44 LW 4864 (1976), upheld against due process attack a school board's authority to dismiss striking teachers. "State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in

which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law." 44 LW 4868. Accordingly, the Court refused "to strip the Board of the otherwise unremarkable power" of discharge, "a power of every employer, whether it is negotiated with the employees before discharge or not." 44 LW 4867. Shortly following *Hortonville*, the Court dismissed for want of a substantial federal question the appeal from the decision of the Michigan Supreme Court upholding under the same Michigan statute here in issue, the discharge of an entire district's striking teachers. *Crestwood Education Association* v *Board of Education of School District of Crestwood*, — US —, 44 LW 3747 (1976).

Massachusetts Board of Retirement v *Murgia*, — US —, 44 LW 5077 (1976), upheld state power to compel policemen to retire at age 50, the Court applying a "rational basis standard" and rejecting the proposition "that a right of governmental employment per se is fundamental." 44 LW 5079.

Bishop v *Wood*, — US —, 44 LW 4820 (1976), sustained a policeman's discharge without a hearing (and assertedly on false charges), the Court stating that, "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made

daily by public agencies." 44 LW 4822-23. The Court emphasized that "the ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion." 44 LW 4823, n. 14.

McCarthy v *Philadelphia Civil Service Commission*, — US —, 44 LW 3530 (1976), upheld a municipally imposed residency requirement for city employees. Rejecting "strict scrutiny" and similar arguments and citing earlier cases, the Court stated (note 6) that "a public agency's relationship with its own employees * * *, of course, may justify *greater* control than over the citizenry at large. Cf *Pickering* v *Board of Education*, 391 US 563, 568; *Civil Service Commission* v *Letter Carriers*, 413 US 548; *Broadrick* v *Oklahoma*, 413 US 601."

Vorbeck v *McNeal*, — US —, 44 LW 3737 (1976), affirmed a three-judge court decision which had upheld, despite First and Fourteenth Amendment objections, a law's denial of collective bargaining to policemen, even while permitting it to other public employees.

City of Charlotte v *Local 660, International Association of Fire Fighters*, — US —, 44 LW 4801 (1976), upheld on a reasonableness test the denial by a municipality of employee-authorized union dues checkoffs despite withholdings from employee salaries for other purposes.

Kelley v *Johnson*, — US —, 44 LW 4469 (1976), upheld, despite First and Fourteenth Amendment contentions to the contrary, a police department grooming code. The Court reemphasized "the wide latitude accorded the Government in the 'dispatch of its own internal affairs.'" The Court also emphasized that the standard for review was not whether the state can "'establish' a 'genuine public

need' for the specific regulation," but whether a complaining employee "can demonstrate that there is no rational connection between the regulation * ** * and the promotion of safety of persons and property." — US —, 44 LW 4472.

This Court has thus most recently given emphasis and recognition to the breadth of state discretion to set the terms and conditions of public employment.[10] We submit that these decisions, especially read with *Hanson,* require a negative answer to the question at bar, whether the Constitution prohibits the states from authorizing contracts which require each public employee to share in the costs of the collective bargaining process which the states require the bargaining representative to conduct on his behalf and to his benefit.

B. *Hanson* Upheld the Rule, Later Perfected in *Street* and *Allen*, That All Employees who Reap the Benefits of the Statutory Collective Bargaining System May Be Required To Share its Costs.

In *Railway Employees Department* v *Hanson,* 351 US 225 (1956), this Court unanimously upheld section 2, Eleventh of the Railway Labor Act, which authorizes labor agreements requiring every employee to tender "the periodic dues, initiation fees and assessments . . . uniformly required as a condition of acquiring or retaining membership." Appellants would distinguish *Hanson* as a mere "private sector" case; there was no genuine "state action"

[10] Pertinently, *Oil, Chemical and Atomic Workers, International Union, AFL-CIO* v *Mobil Oil Corporation,* — US —, 44 LW 4842 (1976), interpreting the National Labor Relations Act, also spoke in the last term of a federal policy favoring union security agreements and permitting the parties to a collective bargaining agreement *"to provide that there be no employees who are getting the benefits of union representation without paying for them."* 44 LW 4842, 4845. (Emphasis added)

in that case, they say, because the federal statute only permits but does not require agreements requiring financial support by employees. Appellants' "state action" disclaimer flies in the face of this Court's express ruling in *Hanson.* Agreeing with the lower court that constitutional issues were presented because the "permissive" federal statute strikes down inconsistent state laws, this Court stated the following:

> "The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein'. . . We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. *Cf Smith* v *Allwright,* 321 US 649. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.[5] *Cf Steele* v *Louisville & N R Co,* 323 US 192, 198-199, 204, *Brotherhood of Railroad Trainmen* v *Howard,* 343 US 768, *Public Utilities Commission of District of Columbia* v *Pollack* 343 US 451, 462. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 US 225, 231.[11]

"[5]Once courts enforce the agreement the sanction of government is, of course, put behind them. See *Shelley* v *Kraemer,* 334 US 1; *Hurd* v *Hodge,* 334 US 24; *Barrows* v *Jackson,* 346 US 249."

[11] Appellants' disclaimer of "state action" not only contradicts such express ruling in *Hanson,* but, in turn the assumption which underlay this Court's later rulings in *Street* and *Allen.* If, as contended, *Hanson* was merely a "private sector" case, declaratory of common law rights, then the parties and this Court in *Street* and *Allen* were needlessly exercised about the asserted political consequences of "private" behavior.

Thus, there was clearly "state action" in *Hanson*, and it was action which this Court (at 238) upheld as consistent with the First and the Fifth Amendments: "*[T]he requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments.*" The rationale for that conclusion was stated (at 234-35) in terms no less applicable in the present case:

> "It is said that the right to work, which the Court has frequently included in the concept of "liberty" within the meaning of the Due Process Clauses (see *Truax* v *Raich*, 239 US 33; *Takahashi* v *Fish & Game Commission*, 334 US 410), may not be denied by the Congress. The question remains, however, whether the long-range interests of workers would be better served by one type of union agreement or another. That question is germane to the exercise of power under the Commerce Clause—a power that often has the quality of police regulations. See *Cleveland* v *United States*, 329 US 14, 19. One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. See Webb, History of Trade Unionism; Gregory, Labor and the Law. To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. The only conditions to union membership authorized by ¶ 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required relates, therefore to the work of the union in the realm of collective bargaining."

Machinists v *Street*, 367 US 740, further perfected the underlying principle. It declined to approve compulsory financial support by employees to the union's expenditures in the areas of politics, wherein each employee maintains his individual option of support or abstention. In *Street* (at pp. 768-769) this Court reconciled the union shop clause of the Railway Labor Act with the First Amendment, by construing it so as to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." On the other hand, it was emphasized (p. 771) that "the union-shop agreement itself is not unlawful." Accordingly, the lower court's injunctive interference with union dues collection from all employees was reversed because it defeated "the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining' " (p. 772). Thus federal law now permits a requirement that employees pay the costs incurred by their collective bargaining representative other than the costs of political expenditures unrelated to collective bargaining.

These principles were fully reaffirmed and reapplied in *Allen*, 373 US 113 (1963).

In sum, this Court upheld in *Hanson*, and perfected in *Street* and *Allen*, a basic principle of labor relations which has had national operation for over forty years. That is the principle under which every employee benefiting from the exclusive statutory bargaining process may be required to contribute to its costs. That rule, first given statutory recognition in the National Labor Relations Act, is the one by which all our political institutions have historically operated. When Congress in the NLRA and RLA adopted employee self-government in labor relations, and approved pro-rata taxation for its costs, it was replicating the prin-

ciple long operative at every level of our government systems. A citizen, as long as he remains a member of the community, must pay his share of its governance costs, local, state and federal. His personal agreement with the expenditures of taxes is not a condition of his duty to pay.

An analogy which further confirms the cost sharing concept is found in the accepted rule which requires members of the Bar to belong to a Bar Association and pay pro-rata dues for the support of its functions. That rule was given extensive examination by this Court in *Lathrop* v *Donahue*, 367 US 820 (1961). Members of this Court were divided on the question there presented, concerning the extent to which the Bar Association's political activities could be taxed to every member. But significantly, the Justices agreed that except for the limits of compulsory payment in the political area, the underlying rule of pro-rata contribution by Bar members is not subject to Constitutional question. The plurality opinion was emphatic in upholding the rule, applicable to attorneys, that costs of improving the profession "should be shared by the subjects and beneficiaries" thereof. And "in light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association" (367 US at 843). Notwithstanding the disagreement over compulsory payments for the political activities of the Bar, no member of this Court questioned the proposition that attorneys may be required to pay for its non-political expenditures. Where those cover activities yielding gain to the members, even Mr. Justice Douglas agreed that they may be taxed to the entire membership. (See *infra*, p. 39, n. 31). Thus there can be no serious question about the prevailing rule, by which states require attorneys to belong to the Bar Asso-

ciation and to pay for its costs. And we discern no meaningful difference between that rule and this rule requiring public employees to pay pro-rata for the state-mandated activities of their bargaining representative. Indeed, the present rule is actually less restrictive—whereas the law applicable to attorneys requires them not only to pay for the Bar Association activities but actually to become its members, the agency shop allows the employee only to pay his pro-rata share without actually becoming a union member and subjecting himself to union rules and discipline.[12]

In sum, the principle upheld in *Hanson*—that all employees must share the costs of the union's collective bargaining for all employees—is simply the principle which operates throughout our society. It is no less applicable, we proceed to show, to collective bargaining in public employment than in private employment, where this Court has unequivocally held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." 351 US at 239.

C. The Compulsory Support Rule Approved in *Hanson* is Equally Justified in Public Employment Bargaining.

1. *Michigan, like more than forty states, has adopted the federal model of exclusive and fair representation, with its significant costs and benefits.*

[12] Reliance by appellants (brief, p. 106) on prior decisions of this Court, *NLRB* v *General Motors Corp*, 373 US 734 (1963), and *Retail Clerks* v *Schermerhorn*, 373 US 746 (1963), to contend that an agency shop agreement is the "practical equivalent" of a union shop agreement is totally misleading. For that was held true not because a requirement to pay a service fee is the equivalent of union membership, but on the contrary because a union membership requirement is itself interpreted under NLRA, §§8(a)(3) (proviso) and 14(b), only to require the payment of dues. In other words, the union membership requirement of the National Labor Relations Act has been whittled to its "financial core." *NLRB* v *GM*, *supra*, at 742.

Over the last two decades there has been a revolution in public sector labor relations, based on the compelling premise that, "a government which imposes upon private employers certain obligations in dealing with their employees, may not in good faith refuse to deal with its own public servants on a reasonably similar basis."[13]

Beginning with Wisconsin in 1959, Massachusetts in 1960, and Michigan in 1965, at least 40 states and the District of Columbia have adopted labor relations laws (by statute, executive order, and/or regulation) governing their public sector employees.[14] Five more states, by court decision or attorney general opinion, have sanctioned public sector collective bargaining without the necessity of legislation.[15]

There has also been a great upsurge in public sector labor organization. The U. S. Department of Labor, Labor-Management Services Administration, Division of Public Employee Labor Relations, recently stated:

> "In recent years the level of public employee labor relations activity has increased dramatically. In October 1973, there were 14.1 million public employees, an increase of more than one half million over the previous year. Not only have the ranks of public employment continued to swell, but the extent of organization has also been growing at an even faster rate. Since 1960, membership in public sector unions and employee associations has more than doubled to almost five million. Today, about one third of the public employee work force is organized, compared to the private sector's organizational level of one quarter. As can be expected, the development of legislative and policy decisions and guidelines has also accelerated with this dynamic growth. More states have taken it upon themselves to enact laws or establish administrative policies to promote harmonious labor relations across the country." Summary of State Policy Regulations For Public Sector Labor Relations (1975).

[13] 1955 Proceedings of the American Bar Association, Section of Labor Relations Law, Report of Committee on Labor Relations of Governmental Employees, 89-90.

[14] See Appendix A-1. There have been similar federal developments, beginning with President Kennedy's seminal Executive Order 10988 for federal employees (3 CFR 521 (Comp. 1959-1963), 5 USC §631 (1964)), issued January 17, 1962; later updated by President Nixon's Executive Order No. 11491 as amended (October 29, 1969, 34 FR 17605; EO 11616, August 26, 1971, 36 FR 17319; EO 11636, December 24, 1971, 36 FR 24901; EO 11838, February 6, 1975, 40 FR 5743; EO 11901, January 30, 1976, 41 FR 4807).

[15] See Appendix A-2.

The state enactments have typically taken as their model the National Labor Relations Act, including particularly its principle of exclusive representation founded on majority rule, which has repeatedly been held to be central to the national labor policy, *NLRB* v *Jones & Laughlin Steel Corp,* 301 US 1 (1937); *J I Case Co* v *Labor Board,* 321 US 332 (1944); *NLRB* v *Allis-Chalmers Mfg Co,* 388 US 175 (1967); *Emporium Capwell Co* v *Western Addition Community Organization,* 420 US 50 (1975), and its principle of the bargaining agent's correlative duty of fair representation to all members of the bargaining unit, whether members of the union or not. *Steele* v *Louisville & NR Co,* 323 US 192 (1944); *Ford Motor Co* v *Huffman,* 345 US 330 (1953); *Syres* v *Oil Workers International Union,* 350 US 892 (1955); *Humphrey* v *Moore,* 375 US 335 (1963); *Vaca* v *Sipes,* 386 US 171 (1967); *Hines* v *Anchor Motor Freight,* — US —, 44 LW 4299 (1976).

Michigan obviously subscribes to these views. Its Public Employment Relations Act (PERA) was signed into law by Governor Romney on July 23, 1965 (1965 PA 379, MCLA 423.201 *et. seq.,* MSA 17.455(1) *et. seq.*). As adopted, the Act guaranteed Michigan public employees in the local

sector (but not State classified employees, because of a State constitutional exemption) the familiar rights of self-organization, (MCLA 423.209, MSA 17.455(9)), collective bargaining (MCLA 423.215, MSA 17.455(15)), secret ballot representation elections (MCLA 423.212, MSA 17.455(12)), and exclusive representation (MCLA 423.211, MSA 17.455(11)), etc.

The Michigan Supreme Court has noted that the Michigan Act is "modeled on the National Labor Relations Act (NLRA)," *Rockwell* v *Crestwood School District Board of Education,* 393 Mich 616, 635-636 (1975), appeal (on other grounds) dismissed for want of a substantial federal question, *sub. nom. Crestwood Education Association* v *Board of Education of School District of Crestwood,* — US —, 44 LW 3747 (1976); *Detroit Police Officers Association* v *City of Detroit,* 391 Mich 44, 53 (1974); *Michigan Employment Relations Commission* v *Reeths-Puffer School District,* 391 Mich 253, 260, 215 NW2d 672 (1974); that federal precedents construing analogous NLRA provisions are persuasive, *Rockwell, supra,* 393 Mich 616, 635-636; and that the Public Employment Relations Act is the "dominant [Michigan] law regulating public employee labor relations," *id,* 393 Mich 616, 629, citing *Detroit Police Officers Association, supra; Regents of the University of Michigan* v *Employment Relations Commission,* 389 Mich 96, 204 NW2d 218 (1973) and *Wayne County Civil Service Commission* v *Board of Supervisors,* 384 Mich 363, 184 NW2d 201 (1971). The Court has stated that in adopting the federal model for the collective bargaining responsibilities imposed by the Act, the legislature "made the judgment that Michigan's public employees should enjoy '• • • many of the rights and kinds of contractural benefits gained by workers in private employment by the collective bargaining process.' " *Detroit Police Officers Association* v *Detroit, supra,* 391 Mich 44, 59 (1974).

The Michigan Supreme Court has made clear that the fanciful version of individual teachers' power to order their own affairs which appellants tender to this Court is now—and always has been—fiction. In a recent decision involving this very bargaining unit, *Detroit Federation of Teachers* v *Detroit Board of Education,* 396 Mich 220, 240 NW2d 225 (1976), the Michigan Supreme Court, in holding that although the Michigan School Code provides for individual employment contracts with teachers the terms thereof are governed by the master contract negotiated by the collective bargaining representative,[16] noted (p. 225): "Before teachers unionized, the terms of a teacher's employment were set forth in a contract between the teacher and the board embodying their agreement. Few individual teachers, however, had any real bargaining power and the contract terms were frequently imposed by the board rather than negotiated by the parties." The Court also observed that, "Now the union and the board negotiate a master collective bargaining agreement which determines the rights of the individual teachers in the bargaining unit." *(id.)*

Under the Michigan law, it is such traditional collective bargaining functions in which public employee unions engage. They achieve, maintain and service bargaining agreements. They annually handle thousands of inquiries and complaints concerning pay, working conditions, class size, work assignments, overtime, seniority, certifications, tenure, layoffs, terminations, discipline, transfers, promotions, evaluations, insurance, retirement, illness, disability, substitute support, scheduling, supplies and equipment, and the like. If meritorious complaints can-

[16] Cf. *J I Case Co* v *Labor Board,* 321 US 332 (1944).

not be resolved, they may ripen into formal "grievances" and later into arbitration proceedings. Hearings are required before the school board, arbitrators, labor relations boards, tenure commissions, retirement commissions, civil rights commissions, other agencies and the courts. Litigation may occur over alleged unfair labor practices, the board's contracting responsibilities under the school code, the enforcement of contracts and awards, desegregation claims, the defense of unfair representation claims, and such suits as this. The union must work through scores of liaison committees, with the board, the community, parent-teacher groups and countless other agencies, public and private. It must counsel, inform, educate, train and otherwise assist its members in their rights and responsibilities. It must sponsor or participate in workshops, in-service training and the like. It must constantly engage in research on the effect of legislation on bargaining unit members. It must be prepared to refer members to outside agencies for assistance. In a decentralized school district like Detroit's it must engage in each of these functions on a multiplied basis in each of the subordinate school districts. It must communicate with teachers. And of course periodically—generally annually—it must engage in the massive project that is known as negotiations for a new contract, involving months of effort, research, organization and the like.

All of these services, in this 11,000 employee bargaining unit, of course cost money—a lot of it—to cover the salaries of 17 full-time (professional and non-professional) staff employees of the defendant Union; to cover housing, heat, electricity, telephone, fuel and water bills; to pay for supplies and equipment; to pay "per capita" taxes to parent organizations for support services. The costs come high, as well, for lawyers, accountants, arbitrators, court reporters and the like. The fact is that the defendant Federation has an annual operating budget exceeding $1 million, and in its last reported fiscal year (1974-75) incurred an operating deficit of approximately $100,000. For all of these costs the union has essentially been dependent on dues, which have generally averaged less than one percent of employee salaries.[17] Consistent with the requirements of Michigan law, such costs are incurred by the union for the benefit of all employees including appellants.[18]

The results in Michigan under PERA have been dramatically beneficial to all teachers;[19] for it is only in recent

[17] The current dues and agency fee rates are as follows: 1.2% (or less, for substitute teachers and certain lower paid job classifications) of the scheduled *minimum* salary for teachers with a B.A. degree; namely, $108.70 per year, or $6.04 biweekly, for teachers earning $10,308-$14,287 per year; or $123.70 per year, or $6.87 biweekly, for teachers earning $12,965-$21,055 per year. The average effective rate for agency shop payers is less than 1%. Members, but not agency shop payers, are also required to pay an additional $4.50 annual building assessment.

[18] The Federation as exclusive bargaining agent owes to appellants and all other bargaining unit members a duty of fair representation both in the negotiation and administration of contracts, for the doctrine of fair representation is applied by the Michigan courts, *Lowe* v *Hotel and Restaurant Employees Union*, 389 Mich 123, 205 NW2d 167 (1973); *McGrail* v *Detroit Federation of Teachers*, 82 LRRM 2623 (Wayne Circuit Court, 1973), aff'd Michigan Court of Appeals, No. 16493 (1974); *Oakland County Sheriff's Dept*, 1968 MERC Lab Op 1(a); and according to a recent decision of the Michigan Court of Appeals, more demandingly than in the federal courts. *Handwerk* v *United Steelworkers of America*, 67 Mich App 747, — NW2d — (1976).

[19] A study by Professor Charles M. Rehmus, Professor of Political Science at the University of Michigan and Co-Director of its Institute of Labor and Industrial Relations, concluded that in 1966-67, following the advent of PERA, teachers who engaged in collective bargaining got salary increases averaging 10 to 20% higher than they would have gotten without collective negotiations. Rehmus and Wilner, *The Economic Results of Teacher Bargaining: Michigan's First Two Years* (1968). Later studies have concluded that "unionization in both the public and private sectors probably gives a permanent relative advantage to the organized." *Teacher Bargaining*, 25 *Research News*, Div. of Research Development Administration, University of Michigan, No. 12 (June, 1975).

years that teachers and other public employees have won, through collective bargaining, pay scales which begin to be comparable to those in the private sector. Moreover, the unprecedented annual inflation rates of recent years have posed special problems for public employees, because the legislative and tax processes and referenda tend to lag behind the inflation rates and thus leave the public employee with diminished purchasing power. Yet under the contracts bargained for them, appellants have achieved a measure of earning security through successive contracts which have provided substantial annual pay increments. Thus salaries have increased for starting teachers (B.A. minimum) from $5,250 per year in the fall of 1964 (the first semester after the Union obtained *de facto* bargaining rights, about a year before PERA was adopted) to $10,308 for the fall of 1976, an increase of $5,058, or 96%. The increase for the M.A.-maximum teacher has been from $8,600 in the fall of 1964 to $20,055 in the fall of 1976, an increase of 133%. The Consumers Price Index for Detroit (commonly referred to as the cost of living) has increased by 86% over approximately the same period (91.0 in September, 1964 to 169.2 in July, 1976). Thus, the Union's bargaining has kept pace with inflation and brought the teachers from a general condition of underpayment to earnings more nearly commensurate with their skills, training and experience.

In addition to achieving contract benefits,[20] the collective bargaining system has also yielded substantial protections and benefits in its grievance-arbitration process. Under the collective bargaining agreement, employee complaints

[20] Such benefits have been both economic—including a number of fringe benefits, such as greatly improved health and life insurance benefits — and non-economic — such as reduced class sizes and greater protections against unjust terminations and discipline.

about the application or interpretation of the agreement are processed (initially by the employee, and later by Union representatives) as "grievances" to successively higher administrative levels of the employer and, if not sooner resolved, to terminal disinterested arbitration under the auspices of the American Arbitration Association. The grievance procedures have been successfully invoked by the Union, *inter alia, on behalf of various plaintiffs in this suit, at their request,* for such diverse matters as rectifying a transfer for alleged insubordination, an allegedly improper discharge, over-sized classes, inappropriate work assignments, and a refusal to permit return from leave, etc.

The grievance and arbitration process is costly. The latest arbitration case concerning a single employee's discharge has already cost the Union $12,710 (for arbitrator's, attorneys', court reporters' and directly related staff fees, but not including general overhead). An earlier arbitration case challenging allegedly oversized classes cost $14,327. And an "interest" arbitration, to establish salaries and class sizes, cost the Union at least $34,075.

These were the economic realities in 1973 when the Michigan Legislature adopted Act 25, explicitly authorizing agency shop agreements with the stated purpose (*supra,* p. 5) to "reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative."

2. *Michigan, like approximately a third of the states, has also appropriately authorized financial support requirements for the bargaining process, which process is essentially economic, not "political."*

Michigan is not alone. Of the 40 states which have adopted public sector collective bargaining laws, at least 16 jurisdictions (as well as the District of Columbia) and perhaps as many as 19 have also authorized union security provisions.[21] Typically these require that all members of the bargaining unit as a condition of employment pay to the bargaining agent either union dues or equivalent fees. While generally the statutes authorize the employer and union to negotiate such clauses, at least five states, Connecticut, Rhode Island, Hawaii, Minnesota and Washington actually mandate union security.[22] As noted by expert observers of these developments:

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[21] See Appendix A-3. In addition to the 15 states and the District of Columbia which expressly authorize agency shop agreements, and Pennsylvania, which authorizes maintenance-of-membership clauses, at least three more states arguably permit agency shop agreements under general bargaining laws absent any prohibitions to the contrary: New Hampshire, Indiana and Idaho. See *Tremblay* v *Berlin Police Union*, 108 NH 416, 237 A2d 668 (1968); but see *Hayward* v *United Public Employees, Local 390 of the Service Employees Int'l Union, AFL-CIO*, 54 Cal App 3d 761, 126 Cal Reptr 710 (1976); *Smigel* v *Southgate Community School District*, 388 Mich 531, 202 NW2d 305 (1972); and *Farrigan* v *Helsby*, 42 App Div 2d 265, 346 NYS2d 39 (1973).

[22] Appendix A-3. Hawaii and Minnesota require a request by the union; as does Washington (some employees), after certain conditions are met. Appellants' contention that certain states leave the implementation of agency or union shop "to the caprice of the employer and the union" (brief, 129) is just a misstatement of the fact that in the states which authorize the agency shop, union security, like other contract provisions, is subject to good faith bargaining. See, e.g., *Massachusetts Nurses Association* v *Lynn Hospital*, — Mass —, 306 NE2d 264 (1974). That does *not* reflect a legislative judgment that union security is not vital, as urged by appellants, only that the parties' mutual interests can best be served through the bargaining process. *Linscott* v *Millers Falls Co*, 440 F2d 14, 18 (CA 1, 1971), *cert den* 404 US 872 (1971). Appellants' analysis also erroneously includes West Virginia and excludes Maine among states which expressly allow public sector agency shop agreements. Further, Washington is properly classified as subject to varying provisions, depending on the type of employees involved; see Appendix A-3.

> "[T]he same reasons that justify legislation authorizing agreements between unions and private employers for the discharge of employees who fail to contribute at least some money to the support of their bargaining agent apply equally well where a government employer is involved. These reasons are twofold. First, under the predominant type of state public employee bargaining legislation, as well as under the NLRA and RLA, a union selected as bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit—union and nonunion alike—in a nondiscriminatory manner. Unless the employees in the unit who remain nonunion can be compelled to contribute to the costs of union representation, which may be considerable, the nonunion employees will enjoy the benefits of the bargaining process while union members are forced to assume the entire burden of paying for it. Second, since the union members in a bargaining unit may be unable to finance adequately the negotiation and administration of a collective bargaining agreement without some monetary contribution from the nonunionists, the resulting financial instability of the duly-elected bargaining agent may jeopardize meaningful collective bargaining by encouraging the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support." Blair, *Union Security Agreements in Public Employment*, 60 Cornell L Rev 183, 189-190 (1975).

Others agree. See, Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 Cornell L Rev 547 (1970);[23] Gromfine, *Union Security Clauses in Public*

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[23] "One desirable way to enhance union responsibility is to adopt an appropriate form of union security agreement. Such arrangements prevent the nonunion employee from sharing in the benefits resulting from union activities without also sharing in the obligations. In addition the security agreement stabilizes the bargaining

Employment, 22nd NYU Conference on Labor, 285 (1969).[24] See also, Wellington and Winter, *The Unions and the Cities*, 96, (1971).[25]

Surely if the states are free to adopt the federal model of majority rule and exclusive representation (which appellants do not challenge) and to require of the bargaining agent the duty of fair representation (which appellees concede), they are equally free to require, as a concomitant, the employees' uniform financial support of bargaining costs. This is particularly true where it is the legisla-

relationship by providing security from attack by rivals and enables union leaders to devote more attention to bargaining and administration of collective agreements." 55 Cornell L Rev 547, 547-548.

[24] "It is a fact, frequently ignored by both friend and foe of collective bargaining that the strike is very often a manifestation not of the strength of a union, but rather of its weakness. This is particularly true in a sector of the economy where collective bargaining is just emerging and has by no means met with universal acceptance. In such a situation, strikes will arise as much from the inability of the union to maintain effective control over the employees in the bargaining unit or the need of the union to develop solidarity through strife, as they will from substantive impasses in bargaining. In my judgment, no solution that may be proposed to the central question of strikes and alternative measures of resolving labor disputes in the public sector has any reasonable chance of success unless it contemplates the existence of unions in that sector that are strong and secure, unions that, by virtue of their strength and security, are free to act, and have the wherewithal to act, with a full measure of responsibility. It must have the security and policy making stability that flow from the fact that policy and strategy decisions affecting all employees in the bargaining unit have been sanctioned by a union membership that is as close as possible to being coextensive with the bargaining unit. It must also have the financial stability that flows from the fact that the costs entailed in exercising its responsibilities, as the bargaining representative for all employees in the bargaining unit, are being shared by all employees in that unit." At 287-288.

[25] "The union security issue in the public sector seems overblown in the sense that it is fundamentally the same issue, with the same merits or demerits, as in the private sector . . . No special dimension results from the fact that a union represents public rather than private employees."

tive judgment, founded in the national experience and supported by scholars, that the *employer* benefits through stability in labor relations. In the public sector, no less than in the private one where *Hanson* has confirmed compulsory dues support, the agency shop is an appropriate compromise between a "free rider" system which would require a portion of the employees to pay the collective bargaining costs of all, and a "compulsory membership" system which would require employees to associate themselves with the union and become subject to its rules.

Seeking to avoid the force of the accepted rule, appellants offer the purported distinction that public employee bargaining is inherently "political," and therefore all union security must be proscribed in the public sector under the rule of *Street* and *Allen*. But appellants offer nothing but rhetoric to support their sweeping claim. Far from being "political," public employment bargaining is a close approximation of the collective bargaining system as it operates in the private sector—as over 40 states and the District of Columbia have intended it to be.[26] To put it another way, the process of settling employment conditions through collective bargaining is not transmuted from economic into "political" activity merely because the employer is a public agency rather than a private party. Concededly, budgetary and tax consequences are involved

[26] Wollett, cited by appellants (brief, 182) concludes that, "Most public employee unions, even those which are professional in nature, do not think of collective bargaining primarily as a vehicle for social change * * * Public employees, including those whose responsibilities and skills are professional or quasi-professsional, think of collective bargaining primarily as a vehicle for protecting and advancing their interests as an employed occupational group." At 375, in Smith, Edwards and Clark: *Labor Relations Law in the Public Sector* (1974).

in the terms agreed upon by a public agency in its collective bargaining contract (or, for that matter, in any other contract to which it agrees). But, it is the public *employer,* rather than the public employee *union,* whose bargaining posture is significantly affected by budget and tax considerations. On the union side the process is essentially the same economic exercise as in the private sector.[27]

Moreover, to say even with respect to the public *employer* that the process is inherently "political" and therefore beyond its authority, is to say that the "fundamental attribute of state sovereignty" which this Court just identified in *National League of Cities* as within the states' "otherwise plenary authority" precisely *because it dealt with labor relations,* 44 LW 4974, 4977, would on that very account be withdrawn from the states.

Appellants rely on several writers — frequently misquoted or quoted out of context[28] — to support their simplistic "public equals political" assertion. But, as appellants concede (brief, 65), responsible commentators in the field are virtually unanimous in urging collective bargaining in the public sector based on the national model. Indeed, appellants' counsel has acknowledged elsewhere that he

[27] Ironically, appellants would regard the railroad industry, involved in *Hanson,* as merely the "private sector," untouched by their arguments. Yet, few others would doubt the "public interest" with which that industry is affected, as evidenced in part by the alacrity with which efforts are made to terminate railway strikes.

[28] For example, Spero and Capozzola, *The Urban Community and Its Unionized Bureaucracies: Pressure Politics In Local Government Labor Relations* (1973), say that municipal collective bargaining "reflects the coloration of municipal politics" (p. 312), with political activities by unions frequently supplementing collective bargaining as such, but they reject the public-private dichotomy as unrealistic, asserting there are more similarities than differences between public and private employees. Moskow, Loewenberg and Koziara, *Collective Bargaining in Public Employment* (1970), speak of public sector collective bargaining occurring "in a political environment," 252, not that collective bargaining is an inherently political process as such. Mosher, *Democracy and the Public Service* (1968), is misquoted at note 20, p. 65, of appellants' brief as saying that "Public-Sector bargaining 'more nearly resembles standard interest-group tactics.'"; in fact, in the referenced sentence, Mosher is not referring to collective bargaining as it is commonly known, but to what he calls "bargaining," in quotation marks, in the state legislatures and Congress. At 188.

stands virtually alone in his views to the contrary.[29] Counsel's present claim that public employee bargaining is "political" rather than economic in character, is simply advocacy of a general antipathy to the process approved by some 45 states of the Union.

Professor Clyde W. Summers, whom appellants cite and who is conceded by them to be a distinguished commentator in the field, does not at all support the sweeping conclusion being offered by appellants. Professor Summers frontally challenges the claim "that collective bargaining in the public sector is inappropriate or that practice in the private sector cannot be transplanted to the public sector. Collective bargaining in both sectors is a process for determining terms and conditions of employment and it might serve both the

[29] See Petro, *Sovereignty and Compulsory Public-Sector Bargaining,* 10 Wake Forest L Rev 25 (1974), particularly pp. 26-27, 43, 48:

"* * * contributors to the voluminous scholarly literature on the subject have been virtually of a single mind. One searches in vain among recent law review articles for a commentator who opposes these trends; not a one has stated in print that the irreconcilable conflict between meaningful sovereign government and meaningful public-sector collective bargaining should be resolved in favor of the former. * * * The law review writers typically put the word 'sovereignty' in quotation marks and then as a rule move swiftly to the conclusion that compulsory public-sector bargaining laws are justified—or even necessary —'on the private-sector analogy.'"

". . . dominant current opinion approves extension to the public sector of the kind of compulsory collective-bargaining legislation which has been applied to the private sector for the last forty years or so."

"While today virtually all commentators in the learned journals, many judges, and enormous numbers of political figures (federal, state, and local) are in favor of bringing compulsory collective bargaining to government employment . . ."

private and public decision making processes equally well in similar, or even quite different ways. Summers, *Public Employee Bargaining: A Political Perspective,* 83 Yale L J 1156-1157 (1974). Far from characterizing the public employee union's bargaining as political, Professor Summers views the process as necessary to counteract the political pressure upon the *other* party at the bargaining table—pressure on the employer to resist concessions to employees which may increase taxes.[30] The employees' collective bargaining power is seen as necessary "to give them an ability to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services". Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking,* 44 Cincinnati L Rev 669, 675 (1975).

What Professor Summers thus supports is not at all appellants' claim that the achievement of a contract by the public employee union is an exercise in politics rather than bargaining. It is the quite different proposition that a government agency, the opposing party at the table, is

[30] "Viewing public employee bargaining from the political perspective gives no guarantee of simple or secure answers—quite the contrary." *Id,* at 1158. "Introduction of collective bargaining into the public sector alters the governmental process, creating within that process special procedures for making decisions about the wages and working conditions the public will give its employees. This is, of course, no argument against public employee bargaining, unless there is some predisposition against innovations in government. There is no immediately evident reason for assuming that customary or preexisting processes are best, or even adequate, when the decision to be made by the public is the special one of how much the public will pay its servants. On the contrary, the fact that the economic interests of the voting public, both as taxpayers and as users of public services, run directly counter to the economic interests of public employees in wages and working conditions suggests that public employees may need special procedures to insure that their interests receive adequate consideration in the political process." *Id,* 1160-1161.

influenced in its bargaining posture by public policy considerations and by its estimate of the taxpayers' tolerance limits. Nothing in that proposition suggests that the public employee who is required to share the costs of collective bargaining is paying for political activity, such as was in view in *Street* and *Allen,* rather than for the economic bargaining function involved in *Hanson.*

Finally, appellants' frequent reliance on opinions of Mr. Justice Douglas is quite misplaced. While those opinions strongly support freedom from compulsory political activity or expenditures, they also fully accept the majority rule system and its corollary of pro-rata taxation of the members. That premise of Mr. Justice Douglas' opinion for the unanimous Court in *Hanson* was reemphasized with particular present pertinence in his opinion in dissent in *Lathrop* v *Donohue,* 367 US 820,877:[31]

> "We dealt [in *Hanson*] only with a problem in collective bargaining, viz., is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those

[31] Justice Douglas emphasized that the issue in *Lathrop* involved Bar Association promotion of causes from which the attorney "obtains no gain and which is not part and parcel of service owing litigants or courts" (at p. 881). Nevertheless, the opinion underscored *(id)* the different result where the lawyer's gain or obligations are involved:

> "If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers, the present objection might not be relevant. In that case, one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. In re Florida Bar, (Fla) 62 So 2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public." At 881.

> who are free riders may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. *The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.*" (emphasis added).

There is no valid distinction between public employment and private employment where *Hanson* upheld the principle of pro-rata contributions for collective bargaining costs.

D. Pro-Rata Payments By Each Employee Toward the Cost of Bargaining Do not Constitute "Association" Subject to First Amendment Restraints, And Are In Any Event Consonant With the Requirements of That Amendment

Thus far, we have demonstrated that *Hanson* (and *Lathrop*) recognize that in bargaining and analogous contexts a government may foster or direct the sharing of at least the costs of the non-political activities of an organization among the beneficiaries of those activities, and that since the purposes of an agency shop clause in the public sector are basically the same as those served by the cost-sharing principle in *Hanson*, such a clause is equally valid when applied to public employees. *Hanson* and *Lathrop* rest on the proposition that at least insofar as political activities are not involved, no First Amendment rights whatever are implicated by requiring such payments. As expressed in *Lathrop*, 367 US at 828, 842:

> "We therefore are confronted, as we were in *Railway Employees' Dept* v *Hanson*, 351 US 225, only with a question of compelled financial support

> of group activities, not with the involuntary membership in any other aspect. . . . We . . . held [in *Hanson*] that §2, Eleventh of the Railway Labor Act . . . *did not* on its face *abridge protected rights of association* in authorizing union shop agreements." (emphasis added)[32]

The "association with the Union" against which appellants complain involves nothing less than their opposition to the collective bargaining relationship as such. That relationship results not from the service fee requirement but simply from the statutory system of collective bargaining. That system in Michigan stipulates that one who has chosen public employment becomes a member of a bargaining unit if a majority of employees have opted for collective bargaining. It is surely too late in the day to question the constitutional validity of such a system, long ago legislated by the Congress and the states and long ago upheld by this Court on account of the compelling purposes it serves, *NLRB* v *Jones & Laughlin Steel*, 301 US 1 (1937); *NLRB* v *Allis-Chalmers Mfg Co*, 388 US 175 (1967); *Vaca* v *Sipes*, 386 US 171 (1967); *Emporium Capwell Co* v *Community Organization*, 420 US 50 (1975).[33]

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[32] See also *Hanson*, 351 US at 238. *Cf. City of Charlotte* v *Fire Fighters*, — US —, 44 LW 4801, where the Court stated that it "would reject . . . if it were made [the contention] that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause." Since distinctions which implicate rights protected under the First Amendment *do* require such scrutiny under the Equal Protection Clause [see, e.g., *Police Department* v *Mosely*, 408 US 92 (1972)] we take the Court's observation in *City of Charlotte* to mean that the decision either to facilitate or fail to facilitate the finances of an organization do not, without more, constitute an impediment to association, cognizable under the First Amendment.

[33] As stated in *Allis-Chalmers* (p. 180):

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an

Even if this case were analyzed, however, on the assumption that First Amendment associational interests *are* implicated by an agency shop clause for public employees, the same result—upholding the authority of the state to require such payments—would follow.

This Court has particularly emphasized that the constitutional duties of a public employer *qua employer* to its employees are significantly less than to citizens at large, *Pickering* v *Board of Education,* 391 US 563, 568 (1968); *Civil Service Commission* v *Letter Carriers,* 413 US 548 (1973); *Broadrick* v *Oklahoma,* 413 US 601 (1973), and the many cases of this past term, part II-A, *supra.* The decision in *Letter Carriers*—the most important recent case in this Court involving the balance to be struck between the associational rights of public employees and the government's interests in limiting such rights—leads inescapably to the conclusion that an agency shop clause for public employees is constitutional.

Letter Carriers involved the Hatch Act prohibition upon involvement of federal employees in partisan political activities. The right of citizens generally to participate in such

appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . .' *Steele* v *Louisville & NR Co,* 323 US 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievance; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' "

activities, and to associate with others to do so, is, of course, at the very core of the First Amendment. *Buckley* v *Valeo,* — US —, 44 LW 4127, 4131 (1976); *Cousins* v *Wigoda,* 419 US 477, 487 (1975); *Kusper* v *Pontikes,* 414 US 51, 56, 57 (1973). And the infringement upon that right in *Letter Carriers* was direct and severe: federal employees under the Hatch Act are entirely prohibited from, among other things, "[o]rganizing or reorganizing a political party organization or political club"; "[t]aking an active part in managing the political campaign of a partisan candidate for public office or political party office"; "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office"; "[s]erving as a delegate, alternate, or proxy to a political party convention"; [and] "[i]nitiating or circulating a partisan nominating petition" (*id,* at 576 n. 21), all rights basic to the political process and indubitably protected as to the populace generally.

The Court approached the question in *Letter Carriers* from the premise that, "Neither the right to associate nor the right to participate in political activities is absolute . . ." (*id,* at 567), and concluded that the " 'balance between the [First Amendment] interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the [government], as an employer, in promoting the agency of the public service it performs through its employees' . . . is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities . . ." *id,* at 564, quoting *Pickering* v *Board of Education,* 391 US 563, 568.[34] In reaching

[34] The "important" interests identified were the interests in: (1) impartial execution of the laws; (2) the appearance of impartial execution; (3) preventing the building of a powerful political

its conclusion, the Court gave deference to the legislative judgment: "Perhaps Congress at some time will come to a different view of the realities of political life and government service, but that is its current view of the matter, and we are not now in any position to dispute it." 413 US at 548.

The First Amendment interest claimed to be infringed here is plainly of a lesser order than that involved in *Letter Carriers*. Appellants are not, on the one hand, as the federal employees in *Letter Carriers* were, prevented from participating to any extent they choose in organizations political or otherwise which attempt to forward appellants' own views and interests, including organizations which oppose directly the position adopted by the Union chosen by a majority of their fellow employees. And, on the other hand, they need not join, attend meetings or otherwise participate in, or be bound by the internal rules of the exclusive bargaining representative. Moreover, they are not obliged under the holding under review nor under the constitution of the Union to support financially any political activities of the Union. The claimed associational right here therefore reduces to the right of an individual not to support an agency to perform a service—here the setting and enforcing of wages, hours and working conditions —on behalf of a group—here teachers employed by the School Board—with which that individual *has* chosen to associate.

The governmental interests opposed to this at best highly attenuated First Amendment right discussed above, *supra*, part II-C, were succinctly summarized by the Second

machine composed of public employees; (4) to prevent coercion of public employees, although "it may be . . . that prohibitions against coercion are sufficient protection." *Id*, at 565-566.

Circuit drawing on and synthesizing this Court's decisions:

> "The congressional purpose in authorizing mandatory union dues is surely a permissible one, for Congress was understandably concerned with minimizing industrial strife and thereby insuring the unimpeded flow of commerce. It was the legislative judgment that these goals are most easily realized if a suitable collective bargaining apparatus exists, see, e. g., *International Association of Machinists* v *Street*, 367 US 740, 760 (1961), and so the national labor laws provide for an exclusive bargaining agent to represent each discrete employee bargaining unit. See, e. g., § 9(a) of the NLRA, 29 U.S.C. § 159(a). To enable these agents to fulfill their statutory responsibility to represent all the employees while collectively bargaining with the employer, the statutes permit the levying of mandatory dues on all employees who will reap the benefits of the union's representation of them in the contract negotiations with the employer. A required tolerance of 'free riders,' i.e., those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden, would result not only in flagrant inequity, see, e.g., *NLRB* v *General Motors Corp, 373 US 374* 740-743, (1963); *Radio Officers' Union* v *NLRB*, 347 US 17, 41, (1954), but might also eventually seriously undermine the union's ability to perform its bargaining functions. It is thus manifest that the statutory treatment of mandatory union dues serves a 'substantial public interest.' "

Buckley v *American Federation of Television & Radio Artists*, 496 F2d 305, 311 (CA 2, 1974), cert den 419 US 1093 (1974), reh den 420 US 956 (1975).[35]

[35] A series of cases has consistently rejected First Amendment religious claims against enforcement of union security clauses.

The concept that a citizen of a polity may be required to share the costs of its government is rooted in historical antiquity and represents an obvious plan of equality and equity. The individual citizen need not be in agreement with or even be a beneficiary in any direct sense of the expenditures for which he is taxed. For example, residents without any children, or with children in private or religious schools, must still pay the taxes for the support of the public schools. The benefit to the dues payer in the present situation is, by contrast, concrete and tangible (see pp. 27-31, *supra*).

Finally, since in this case the enactment challenged is that of a state regulating labor relations with government employees of the state subdivisions, the principle of reasonable deference to the legislature is at least as appropriate as it was in *Letter Carriers*. See *supra*, part II-A.[36]

Linscott v *Millers Falls Co*, 440 F2d 14 (CA 1, 1971), *cert den* 404 US 872 (1971); *Gray* v *Gulf, Mobile & Ohio Railroad Co*, 429 F2d 1964 (CA 5, 1970), *cert den* 400 US 1001 (1971); *Yott* v *North American Rockwell Corp*, 501 F2d 398 (CA 9, 1974); *Hammond* v *United Papermakers and Paperworkers Union, AFL-CIO*, 462 F2d 174 (CA 6, 1972), *cert den* 409 US 1028 (1972); *Ciba-Geigy Corp* v *United Textile Workers*, — F Supp —, 88 LRRM 3187 (D RI, 1975); *Wondzell* v *Alaska Wood Products, Inc*, 91 LRRM 2902 (Alas Super Ct, 1975). These cases have found a "compelling governmental interest" in collective bargaining and industrial peace as embodied in the federal labor laws, justifying the asserted burdens on the complaining plaintiffs' religious practices. The courts have found an appropriate accommodation of interests in the complainants being excused from the obligation of union *membership*, while remaining required to pay fees equivalent to union dues—considered a relatively insignificant intrusion, if any, on the objectors' rights.

[36] If state sovereignty precludes the Congress from regulating conditions of state employment, *National League of Cities* v *Usery*, then surely the states are free to regulate those conditions themselves as an aspect of their own sovereignty. If Michigan under PERA can permit a school board summarily to fire virtually all of a school district's employees for striking, *Crestwood Education Association* v *Board of Education of School District of Crestwood*, then surely it can authorize a school board under the same Act to agree to positive mechanisms designed to head off labor disputes in the first place, by making the collective bargaining process work. If there is no fundamental right of government employment, *Massachusetts Board of Retirement* v *Murgia*, and the power of discharge which belongs to every employer is "unremarkable," *Hortonville School District* v *Hortonville Education Ass'n*, then surely it is no more remarkable when authorized in union security mechanisms intended to assure constructive labor relations in the public sector. And if a governmental employer owes *lesser* constitutional responsibilities to its own employees than to the public at large, *Pickering* v *Board of Education* and last term's cases, and if a state can impinge directly upon the political activities and expression of its employees for "valid and important state interests," *Broadrick* v *Oklahoma*, 413 US 601, 606, then surely it may achieve like goals through union security provisions which impinge on no freedom of expression or political activities whatever or which, *arguendo*, if they do, are justified under the most demanding of standards on a balancing basis.

Thus, a state statute providing for agency shop clauses when negotiated between parties to a collective bargaining agreement covering public employees reflects substantial public interests. Even if, contrary to *Hanson* and *Lathrop*, it is considered that such clauses "abridge protected rights of association" (*Lathrop, supra*, 367 US at 842), the interests served by any such abridgement are "important," the degree of infringement of any associational interests is minor, and the state's broad authority to order the labor relations of its subdivisions is at least equivalent to the authority of Congress to determine the conditions of employment of federal employees.

CONCLUSION

As we have shown, under the governing Michigan law as construed and limited by the ruling below, there is no genuine issue of compulsory political expenditures support in this case. And as concerns the validity of the agency shop in public employment, this Court's *Hanson* ruling leaves no serious doubt. Since under the federal laws employes in the private sector may constitutionally be required to provide pro-rata financial support to the collective bargaining representative, there is no valid reason for a different result in the case of employees who are represented in and beneficiaries of public sector collective bargaining. Indeed, this Court's several decisions at the last term underscore that states have even more regulatory discretion and latitude to set the terms and conditions of their own public employment than does the Congress.

Pro-rata financial support by public employees, under the agency shop compromise, is eminently with the state's authority and well within constitutional bounds.

It is submitted that the appeal should be dismissed for want of a substantial federal question, or the ruling below should be affirmed.

Respectfully submitted,
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September, 1976.

APPENDIX

APPENDIX A-1

States — including the District of Columbia — where public employee collective bargaining is expressly permitted by statute, executive order, or regulation.

ALASKA

Alas. Stat. §23.40.070 *et seq.* (1972) (public employees generally, except teachers and non-certified employees of school districts); *Id.* §23.40.110(a)(5), (c)(2)(1972) (mutual duty to bargain); *Id.* §23.40.100(b) (exclusive representation); Alas. Stat. Ann. §14.20.550 *et seq.* (1975); *Id.* (mutual duty to negotiate); *Id.* §14.20.560(b) (exclusive representation);

CALIFORNIA

Cal. Gov't Code §3500 *et seq.* (Supp. 1976); *Id.* §3501 (local public employees except teachers); *Id.* §3505 (duty to meet and confer); *Id.* §3502 (employees can represent themselves individually); Cal. Gov't Code §3525 *et seq.* (Supp. 1976) (state employees); *Id.* §3530 (teachers) (duty to meet, confer and negotiate); *Id.* §3527 (employees can represent themselves individually); Cal. Gov't Code §3540 *et seq.* (Supp. 1976); *Id.* §3543.5(c) (duty to meet and confer); *Id.* §3543.1 (exclusive representation); Cal. Pub. Util. Code §70120 (1973) (transit workers); *Id.* (duty to negotiate in good faith); *Id.* (exclusive representation);

CONNECTICUT

Conn. Pub. Act No. 75-566 §1 *et seq.* (1975) (state employees); *Id.* §3(a)(4), (b)(3) (mutual duty to bargain); *Id.* §5 (exclusive representation); Conn. Gen. Stat. Ann. §7-467 *et seq., as amended,* (1972) (municipal employees); *Id.* §7-469 (mutual duty to bargain); *Id.* §7-468 (exclusive representation); Conn. Gen. Stat. Ann. §10-153 (a) *et seq.*

(Supp. 1976) (teachers); *Id.* §10-153(d); (mutual duty to bargain); *Id.* §1536(c) (exclusive representation);

DELAWARE

Del. Code Ann. tit. 19, §1301 *et seq.* (1974) (state and local public employees); *Id.* §1301(e) (mutual duty to bargain); *Id.* §1306 (exclusive representation); Del. Code Ann. tit. 14, §4001 *et seq.* (1974) (public school employees); *Id.* §4008(a) (mutual duty to bargain); *Id.* §4004 (exclusive representation); *Id.* §4007 (employees may appear on their own behalf on matters concerning their employment relations); Del. Code Ann. tit 19, §802 (protects collective bargaining rights of transit workers);

FLORIDA

Fla. Stat. Ann. §447.001 *et seq.* (Supp. 1976-77) (public employees generally); *Id.* §§447.010(1), 447.002(14) (mutual duty to bargain); *Id.* §447.009 (exclusive representation);

GEORGIA

Ga. Code Ann. §54-1301 *et seq.* (1974) (fire fighters); *Id.* §54.1314 (applies to cities of 20,000 or more which choose to be covered); *Id.* §§54-1304, 54-1306 (mutual duty to bargain); *Id.* §54-1305 (exclusive representation);

HAWAII

Hawaii Rev. Stat. §89-1 *et seq.* (Supp. 1975) (public employees generally); *Id.* §89-9 (mutual duty to bargain); *Id.* §89-8(a) (exclusive representation);

IDAHO

Idaho Code §44-1801 *et seq.* (Supp. 1975) (fire fighters); *Id.* §§44-1802, 44-1804 (meet and confer); *Id.* §44-1803 (exclusive representation); Idaho Code §33-1271 *et seq.* (Supp.

1975) (teachers); *Id.* §33-1272(3) (mutual duty to meet and confer); *Id.* §33-1273 (exlusive representation);

ILLINOIS

Ill. Exec. Order No. 6 (Sept. 1973) (state employees); *Id.* §6 (mutual duty to bargain); *Id.* §5 (exclusive representation); Ill. Ann. Stat. §328(a) (1966) (permits collective bargaining for municipal transit workers);

INDIANA

Ind. Ann. Stat. Code §20-7.5-1-1 *et seq.* (1975) (teachers); *Id.* §20-7.5-1-3 (mutual duty to bargain); *Id.* §20-7.5-1-10 (exclusive representation); Ind. Ann. Stat. Code §22-6-4-1 *et seq.* (Supp. 1976) (public employees excluding police, fire fighters, and teachers); *Id.* §22-6-4-13 (mutual duty to bargain); *Id.* 22-6-4-7(b) (exclusive representation). *But see Benton Community School Corp.* v *Ind. Educ. Employment Labor Rel. Bd.*, Case No. C 75-141, 91 LRRM 2521 (Ind. Cir. Ct. 1976) (holding Ind. Ann. Stat. Code §20-7.5-1-1 *et seq.* unconstitutional), appeal filed (1976). *See* Appendix A-2, *infra.*

IOWA

Iowa Code Ann. §20.1 *et seq., as amended,* (Supp. 1976) (public employees generally); *Id.* §§9, 16 (mutual duty to bargain); *Id.* §14.1 (exclusive representation);

KANSAS

Kan. Stat. Ann. §75-4321 *et seq.* (Supp. 1975) (public employees generally, excluding teachers); *Id.* §75-4322(m) (mutual duty to meet and confer); *Id.* §4327(d) (exclusive representation);

KENTUCKY

Ky. Rev. Stat. Ann. §345.010 *et seq., as amended,* (1973) (fire fighters); *Id.* §345.010(1) (applies to cities of 300,000

or more and to cities that petition for coverage); *Id.* §345.040 (mutual duty to bargain); *Id.* §345.030(3) (exclusive representation); Ky. Rev. Stat. Ann. §78.470 *et seq.* (1972) (permits collective bargaining for county police in counties of 300,000 or more);

LOUISIANA

La. Stat. Ann. §23.890 (Supp. 1976) (transit workers); *Id.* (requires employer to bargain collectively with union selected by majority). *See* Appendix A-2, *infra;*

MAINE

Me. Rev. Stat. Ann., tit. 26, §1021 *et seq.* (Supp. 1975-76) (university employees); *Id.* §1026 (mutual duty to bargain); *Id.* §1025-B (exclusive representation); Me. Rev. Stat. Ann., tit. 26, §961 *et seq.* (1974) (municpal employees); *Id.* §965 (mutual duty to bargain); *Id.* §967 (exclusive representation); Me. Rev. Stat. Ann., tit. 26, §979 *et seq., as amended,* (Supp. 1975-76) (state employees); *Id.* §979-D (mutual duty to bargain); *Id.* §979-E (exclusive representation);

MARYLAND

Ann. Code of Md., art. 77, §160 *et seq.*, §160 A *et seq., as amended* (1975) (certified and non-certified public school employees in certain counties); *Id.* §§160(b), 160 A(h) (mutual duty to meet and confer); *Id.* §§160(f), 160 A(f) (exclusive representation); Ann. Code of Md., art. 64B, §37(b) (1972) (transit workers);

MASSACHUSETTS

Mass. Gen. Laws Ann., ch. 150 E, §1 *et seq.* (1976) (public employees generally); *Id.* §6 (mutual duty to bargain); *Id.* §4 (exclusive representation);

MICHIGAN

Mich. Comp. Laws Ann. §423.201 *et seq., as amended,* (Supp. 1976-77) (public employees except state civil service); *Id.* §423.215 (mutual duty to bargain); *Id.* §423.211 (exclusive representation);

MINNESOTA

Minn. Stat. Ann. §179.61 *et seq., as amended,* (Supp. 1976) (public employees generally); *Id.* §179.65(4) (mutual duty to bargain); *Id.* §179.65(2) (exclusive representation);

MISSOURI

Ann. Mo. Stat. §105.500 *et seq.* (Supp. 1976) (public employees excluding police, sheriffs, highway patrol and national guard); *Id.* §105.520 (meet and confer); *Id.* §105.500 (exclusive representation);

MONTANA

Rev. Code of Mont. §59-1601 *et seq.* (Supp. 1975) (public employees generally, excluding nurses); *Id.* §§59-1604, 59-1605 (mutual duty to bargain); *Id.* §59-1609 (exclusive representation); Rev. Code of Mont. §41-2201 *et seq.* (Supp. 1975) (nurses); *Id.* §41-2203(4) (mutual duty to bargain); *Id.* §41-2205 (exclusive representation);

NEBRASKA

Neb. Rev. Stat. Code Ann. §48-801 *et seq.* (1974) (public employees and public utility employees); *Id.* §48-816 (mutual duty to bargain and exclusive representation); Neb. Rev. Stat. Ann. §79-1287 (1971) (teachers of certain school districts); *Id.* §§79-1290, 79-1292 (meet and confer upon board of education approval); *Id.* §79-1289 (representation of members only);

NEVADA

Nev. Rev. Stat. §288.010 *et seq., as amended,* (1973) (lo-

cal public emp oyees); *Id.* §288.150 (mutual duty to bargain); *Id.* §28 .160(2) (exclusive representation);

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. §273-A:1 *et seq.* (Supp. 1975) (public employees generally); *Id.* §273-A:3 (mutual duty to bargain); *Id.* §§273-A:11 (exclusive representation);

NEW JERSEY

N.J. Stat. Ann. §34:13 A-1 *et seq.* (Supp. 1976) (public employees generally); *Id.* §34:13 A-5:3 (Supp. 1976) (mutual duty to bargain, exclusive representation);

NEW MEXICO

Regs. for Labor Management Rel. §1 *et seq.*, N.M. State Personnel Bd., (effective June 1, 1976) reported in 51 BNA/Gov't Employee Rel. Rep. Ref. File 4011 (1976); *Id.* (state classified employees); *Id.* §1 (permits but does not require collective bargaining); *Id.* §§22(i), 7 (permits exclusive representation);

NEW YORK

NY Civil Service Law §200 *et seq.* (McKinney, 1973); *Id.* §§204(2), 209a(1)(d) (mutual duty to bargain);

NORTH DAKOTA

N.D. Cent. Code §15-38.01 *et seq.* (1971) (teachers); *Id.* §15-38.12 (mutual duty to bargain); *Id.* §15-38.11 (exclusive representation);

OKLAHOMA

Okla. Stat. Ann., tit. 11, §548.1 *et seq.* (Supp. 1975-76) (fire fighters); *Id.* §§548.3(7), 548.3(8)(a)(5), 548.3(8)(b)(3) (mutual duty to bargain); *Id.* §548.4c(1) (exclusive representation); Okla. Stat. Ann., tit. 70, §509.1 *et seq.* (1972) (teachers); *Id.* §509.6 (duty to bargain in good faith); *Id.* §509.2 (exclusive representation but individual may choose to opt out);

OREGON

Ore. Rev. Stat. §243.650 *et seq., as amended,* (1975) (public employees generally); *Id.* §§243.656, 243.650(4) (mutual duty to bargain); *Id.* §243.466 (exclusive representation);

PENNSYLVANIA

Pa. Stat. Ann., tit. 43, §1101.101 *et seq.* (Supp. 1976-77) (public employees except policemen and fire fighters); *Id.* §§1101.701, 1101.120(a)(5) and (b)(5) (mutual duty to bargain); *Id.* §1101.606 (exclusive representation); Pa. Stat. Ann., tit. 43, §217.1 *et seq.* (Supp. 1976-77) (policemen and fire fighters); *Id.* §217.2 (mutual duty to bargain); *Id.* §217.1 (exclusive representation); Pa. Stat. Ann., tit. 53, §39951 (Supp. 1976-77) (transit workers); *Id.* §399.51(d) (duty to bargain collectively and enter into written agreement);

RHODE ISLAND

Gen. Laws of R.I. Ann. §36-11-1 *et seq., as amended,* (Supp. 1975) (state employees); *Id.* §36-11-7 (mutual duty to bargain); *Id.* §36-11-2 (exclusive representation); Gen. Laws of R.I. Ann. §28-9.4-1 *et seq.* (Supp. 1975) (municipal employees); *Id.* §28-9.4-5 (mutual duty to bargain); *Id.* §28-9.4-4 (exclusive representation); Gen. Laws of R.I. Ann. §28-9.3-1 *et seq., as amended,* (Supp. 1975) (teachers); *Id.* §28-9.3-4 (mutual duty to bargain); *Id.* §29-9.3-3 (exclusive representation);

SOUTH DAKOTA

S.D. Comp. Laws Ann. §3-18-1 *et seq.* (1974) (public employees generally); *Id.* §§3-18-2, 3-18-3.1(5), 3-18-3.2(4)

(mutual duty to bargain); *Id.* §3-18-3 (exclusive representation);

TENNESSEE

Tenn. Code Ann. §6-3802 (1975) (collective bargaining for transit workers);

TEXAS

Civ. Stat. of Tex. Ann., art. 5154c-1, §1 *et seq.* (Supp. 1975-76) (policemen and fire fighters); *Id.* §6 (mutual duty to bargain); *Id.* §6 (exclusive representation);

UTAH

Utah Code Ann. §34-20a-1 *et seq.* (Supp. 1975) (fire fighters); *Id.* §34-20a-5 (mutual duty to bargain); *Id.* §34-20a-3 (exclusive representation);

VERMONT

Vt. Stat. Ann., tit. 27, §901 *et seq., as amended,* (Supp. 1975) (state employees and employees of state colleges); *Id.* §§902(2), 961(4), 962(4) (mutual duty to bargain); *Id.* §941(h) (exclusive representation); Vt. Stat. Ann., tit. 21, §1721 *et seq.* (Supp. 1975) (municipal employees); *Id.* §1725 (mutual duty to bargain); *Id.* §1723 (exclusive representation); Vt. Stat. Ann., tit. 16, §1981 *et seq.* (Supp. 1975) (teachers); *Id.* §2001 (mutual duty to bargain); *Id.* §1991(a) (exclusive representation);

WASHINGTON

Wash. Rev. Code Ann. §41.56.010 *et seq.* (1974) (local public employees); *Id.* §41.56.030(4) (mutual duty to bargain); *Id.* §41.56.080 (exclusive representation); Wash. Rev. Code Ann. §28B.52.010 *et seq.* (1974) (academic community college employees); *Id.* §28B.52.030 (mutual duty to negotiate); *Id.* §28B.52.050 (individual may represent himself); Wash. Rev. Code Ann. §28B.16.100 (1975) (teachers in higher education, permits collective negotiation and provides for exclusive representation); Wash. Rev. Code Ann. §41.59.010 *et seq.* (1975) (teachers); *Id.* §41.59.020(2) (mutual duty to bargain); *Id.* §41.59.090 (exclusive representation); Wash. Rev. Code Ann. §41.06.140 *et seq.* (Supp. 1975) (state civil service employees, civil service given autority to promulgate rules for collective bargaining); *Id.* §41.06.150 (exclusive representation);

WISCONSIN

Wis. Stat. Ann. §111.80 *et seq.* (1974) (state employees); *Id.* §111.84 (1)(d), (2)(c) (mutual duty to bargain); *Id.* §111.83(1) (exclusive representation); Wis. Stat. Ann. §111.70 *et seq.* (1974) (local employees); *Id.* §111.70(3)(a)(4), (b)(3) (mutual duty to bargain); *Id.* §111.70(4)(d)(1) (exclusive representation);

WYOMING

Wyo. Stat. §27-265 *et seq.* (1967) (fire fighters); *Id.* §§27-266, 27-267 (meet and confer); *Id.* §27-267 (exclusive representation);

DISTRICT OF COLUMBIA

Order No. 70-229, Comm'r of D. C., District Personnel Manual, ch. 25A (1970) (public employees generally); *Id.* §3(1) (duty to negotiate); *Id.* §3(j) (exclusive representation).

APPENDIX A-2

States permitting public employee collective bargaining by court or attorney general opinion.

ARIZONA

IBEW v. *Salt River Project,* 78 Ariz. 30, 275 P.2d 393 (1954) (public employers may, but are not required to enter into collective bargaining agreement with their employees);

ARKANSAS

Fort Smith v. *Ark State Council,* No. 48, 245 Ark. 409, 433 S.W. 2d 153 (1968) (public employers may, but are not required to bargain collectively with union);

COLORADO

Littleton Educ Assn v. *Arapahoe School Dist. No. 6,* Civ. No. 26963 (Colo. Sup. Ct. 1976) (permits collective bargaining without statutory authorization);

INDIANA

East Chicago Teachers Union, Local 511 v. *Bd. of Trustees of East Chicago,* 287 N.E. 2d (Ind. Ct. Appeals, 1972) (school board has authority to enter collective bargaining agreements); *see* citations in Appendix A-1 *Supra;*

LOUISIANA

Louisiana Teachers Assn v *Orleans Parish School Bd.,* 303 So. 2d 564 (La. Ct. Appeals, 1974), *writ of review denied,* 305 So. 2d 541 (La. Sup. Ct. 1975) (school board has the authority to bargain collectively with teachers' union and to recognize it as exclusive bargaining agent); *New Orleans Fire Fighters Assn, Local 632* v. *New Orleans,* 204 So. 2d 690 (La. Ct. App. 1967) (oral collective bargaining agreement between city and union enforced);

OHIO

Foltz v. *Dayton,* 50 Ohio Op. 384, 272 N.E. 2d 169 (Ohio Ct. of Appeals, 1970) (municipal employees have collective bargaining rights); *Ohio Civil Service Employees Assn. v. Div. II, Ohio Dept. of Highways,* 272 N.E. 2d 919 (Ct. Common Pleas, Tuscaranas City, 1970) (employer may discuss working conditions with union, but cannot enter collective bargaining agreement);

WEST VIRGINIA

Op. Att'y. Gen. (June 26, 1974) (county school board may recognize teacher unions and bargain collectively with them); Op. Att'y. Gen. (July, 1962) (public employee may join unions and discuss wages, hours, and working conditions, but final determination rests with the public employer);

APPENDIX A-3

States—including the District of Columbia—permitting union security for some or all public employees.

ALASKA

Alas. Stat. §23.40.110 (b)(i) & (2) (1972) (public employees except teachers and non-certified employees of school districts may enter into union or agency shop provisions); *Id.* §23.40.255, *as amended,* reported BNA 11 SLL 215 (Aug. 9, 1976) (union security provisions must protect "right of nonassociation" of employees having bona fide religious convictions against joining or participating in the union; such employees shall pay the equivalent of fees, dues, and assessments which the union shall contribute to the charity of its choice); *Id.* §14.20.550(b)(1)(2)(1972) (authorizes collective bargaining for teachers but is silent with respect to union security);

CALIFORNIA

Cal. Gov't Code §3546 (Supp. 1976) (public education employees may negotiate "organizational security provision," but the employer may request that such issue be severed and ratified separately by the employees); *Id.* §3540.1 (i)(1), (2) (organization security means either agency shop or union shop). *But see,* Cal. Gov't Code §3502 (1966) (local public employees have right to refuse to join union or to participate in union activities); *Hayward* v. *United Public Service Employees, Local 390,* 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976) (the above statutory provision also prohibits agency shop; Cal. Gov't Code §3527 (Supp. 1975) (state employees have right to refuse to join union and to participate in union and union activities); Cal. Pub. Util. Code §70120 (1973) (silent on union security);

CONNECTICUT

Conn. Pub. Act No. 750566, §11 (a)-(b) (Jan., 1975) (bargaining unit employees who are not members of exclusive representative are required to pay an agency shop service fee. Dues and service fee check-off is negotiable); Conn. Gen. Stat. Ann. §7-477 (1972) (payroll deduction of union dues and fees for municipal employees is negotiable). This latter provision when read together with the other provisions of the act (Conn. Gen. Stat. Ann. §7-467 *et seq.*) seems to allow union security for municipal employees. *See,* Conn. Gen. Stat. Ann. §7-468 (1972) (employees have the right to form, join, or assist union, free from actual coercion or restraint, but no right to refrain from joining, forming or assisting unions is expressed); Conn. Gen. Stat. Ann. §7-470, *as amended,* (Supp. 1976) (these unfair practice provisions do not include as an unfair practice

discrimination for the purpose of encouraging or discouraging union membership); *Local 1390, AFSMCE,* Consolidated Case Nos. MVPP 2836-39, reported in 653 BNA Gov't Employee Rel. Rep. at B-1 (Conn. St. Bd. of Labor Relations, 1976) (Conn. Gen. Stat. §7-467 *et seq.* implicitly authorizes union shop). *But see,* Conn. Gen. Stat. Ann. §10-153 (a) (Supp. 1976) (expressly prohibits union shop for teachers);

HAWAII

Hawaii Rev. Stat. Ann. §89-3, 4(a) (Supp. 1975) (state and local employers are required upon the exclusive representative's request to deduct from every bargaining unit member's check a reasonable service fee to defray the union's costs in negotiating and administering the contract); *Id.* §89-4(b) (checkoff of regular union dues, initiation fees, insurance premiums upon employees written authorization);

KENTUCKY

Ky. Rev. Stat. Ann. §345.050(1)(c) (1973) (municipal employers are authorized to enter union shop agreements with fire fighter unions). *But see,* Ky. Rev. Stat. Ann. §78.470 (1972) (prohibits union and agency shop for county employees);

MAINE

Me. Rev. Stat. Ann., tit. 26, §10[illegible]3) (Supp. 1975-76) (union shop and agency shop negotiable for university employees). *But see,* Me. Rev. Stat. Ann., tit. 26, §§963, 964 (1)B, 964(2) (1974) (may be construed to prohibit union and agency shop for municipal employees); Me. Rev. Stat. Ann., tit. 26, §§979-B, 979-C(1)B, (2)A (Supp. 1975-76) (may be construed to prohibit union and agency shop for state employees);

MASSACHUSETTS

Mass. Gen. Laws. Ann., ch. 150E, §12 (Supp. 1976) (if the collective bargaining agreement so provides, the public employer shall require as a condition of employment the payment of a service fee proportionately commensurate with the cost of collective bargaining and contract administration; such a provision must be ratified by a majority of the employees voting); Mass. Gen. Laws Ann., ch. 180, §17G (Supp. 1976) (need written employee authorization for check-off of the above-mentioned service fee). *See, Karchman* v. *Worcester,* ..... Mass. ....., 301 N.E. 2d 570 (1973) (nonunion members have the option as to whether the service fee will be deducted from their payroll check, but they are still obligated to pay the service fee);

MICHIGAN

Mich. Comp. Laws. Ann. §423.210(1) (Supp. 1976-77) (agency shop negotiable for public employees);

MINNESOTA

Minn. Stat. Ann. §179.65(2), *as amended,* Pub. L. 1976, ch. 102 (effective March 17, 1976) (all public employees who are not members of the union may be required to contribute a fair share service fee equal to regular membership dues less the costs of benefits financed through membership dues; the fair share service fee shall not exceed 85% of the regular membership dues); *Robbinsdale Educ. Assn.* v. *Robbinsdale Federation of Teachers,* ..... Minn. ....., 239 N.W. 2d 437 (Minn. Sup. Ct. 1976) appeal filed, No. 75-1628 (U.S. Sup. Ct., May 7, 1976) (fair share provision upheld as not violating due process); *Knight* v. *Alsop,* .... F. 2d. ...., 92 LRRM 2627 (C.A. 8, 1976) (three judge panel convened to hear constitutional challenges to

the fair share provision); *Beckman* v. *St. Louis County Bd. of Commissioners,* .... Minn. ...., 241 N.W. 2d 302 (1976) (prior to enactment of the 1973 amendment providing for fair share, checkoff of service fee under agency shop agreement held unlawful because the earlier statute provided that employees must consent to checkoff);

MONTANA

Rev. Code of Mont. §59-1605(1)(c) (Supp. 1975) (agency shop is negotiable for all public employees except nurses; service fee is the equivalent of union dues and initiation fees). *But see,* Rev. Code of Mont. §41-2201 *et seq.* (Supp. 1975) (silent with respect to union security for nurses); *Id.* §41-2203(3) (it's an unfair practice for an employer to discriminate with respect to hiring and conditions of employment to encourage or discourage union membership);

OREGON

Ore. Rev. Stat. §§243.650(10), 243.672(1)(c) (1975) (public employer and union can negotiate a fair share agreement whereby employees who are not members of the union are required to make "an in-lieu-of-dues payment" to the union; such an agreement must reflect majority opinion); *Id.* §243.666(1) (1975) (union security — including union or agency shop agreement—must safeguard "the rights of non-association" by allowing those who cannot join the union because of religious beliefs to pay the equivalent of union dues, fees, and assessments to a charity);

PENNSYLVANIA

Pa. Stat. Ann., tit. 43, §1101.705 (maintenance of membership and dues checkoff provisions are negotiable); *Pa. Labor Relations Board* v. *Zelem,* 459 Pa. 399, 329 A. 2d 474 (1974) (agency shop provisions are implicitly prohibited under the above statute); Pa. Stat. Ann., tit. 43, §217.1

et seq. (Supp. 1976-77) (for policemen and fire fighters) (silent with respect to union security); Pa. Stat. Ann., tit. 53, §39951 (Supp. 1976-77) (silent with respect to union security for transit workers);

RHODE ISLAND

Gen Laws. R.I. §36-11-2, *as amended,* (Supp. 1975) (once an exclusive bargaining representative is selected, all non-members are required to pay the union a service fee equal to the membership dues); Gen. Laws. R.I. §28-9.3-7, *as amended,* (Supp. 1975) (where teachers have selected an exclusive bargaining representative, all non-members shall pay to the union a service charge equal to the regular dues); *North Kingston* v. *North Kingston Teachers Assn., Local 1704,* 110 R.I. 698, 297 A. 2d 342 (1972) (prior to the enactment of the above statutory provision, the court upheld fair share agency shop even though the teachers had the right to refrain from joining the union); Gen. Laws R.I. §28-9.4-1 *et seq.* (1969) (there is no express authorization for union security for municipal employees, and such employees have the right to refrain from joining a union. However, according to *North Kingston, supra,* municipal employers and unions could still negotiate fair share agreements);

VERMONT

Vt. Stat. Ann., tit. 21, §§1722(a)(1), 1726(a)(8) (Supp. 1975) (union shop and agency shop negotiable for municipal employees); Vt. Stat. Ann., tit. 16, §1982(a) (Supp. 1975) (teachers have the right to refrain from joining or participating in a union); Vt. Stat. Ann., tit. 21, §1735 (Supp. 1975) (teachers are deemed municipal employees within the meaning of the unfair practice sections, such as §1726(a)(8), and, by implication, therefore, agency and

union shop provisions for teachers should be permissible); *but see,* Vt. Stat. Ann., tit. 27, §903, *as amended,* (Supp. 1975) (state employees are expressly prohibited from entering into agency shop and union shop agreements);

WASHINGTON

Wash. Rev. Code §41.56.122(1) (1975) (union security provisions other than closed shop are negotiable for public employees so long as the "right of non-association" for employees with religious beliefs against union activity is protected by allowing such employees to pay the equivalent of union dues to a charity); Wash. Rev. Code §41.59.100 (1975) (union security other than closed and union shop is negotiable for certified school employees but "right of non-association" of employees with religious beliefs against participating in a union must be protected by allowing such employees to pay the equivalent of such dues to a charity); Wash. Rev. Code §28B.16.100 (1975) (requires agency shop for higher education teachers upon the union's request and after a majority of the bargaining unit members vote to require it as a condition of employment, but "the right of non-association" must be protected as stated in the above statutes); Wash. Rev. Code §41.06.150 (Supp. 1975) (requires agency shop for state civil service employees upon the union's request and after a majority of the bargaining unit members vote to require it as a condition of employment but "right of non-association" must be protected as in the above statutes); *See, Assn. of Capitol Powerhouse Engineers* v. *Division of Bldg. and Grounds, State of Washington,* Case No. 50436 (Thurston Cty. Super. Ct., March 26, 1976), appeal filed (1976), reported in 641 BNA Gov't Employee Rel. Rep. at B-4 (June 14, 1976) (agency shop provision upheld as not violating

freedom of speech, assembly, religion, due process, and equal protection under state and U.S. Constitution). *But see,* Wash. Rev. Code. §28B.52.070 (1974) (boards of trustees of community colleges cannot discriminate against academic employees because of membership or nonmembership in a union); Op. Att'y Gen., 1975 No. 7 (April 22, 1975), reported in 620 BNA Gov't Employee Rel. Rep. at B-9 (August 25, 1975) (the above provision prohibits agency shop agreements for such academic employees);

WISCONSIN

Wis. Stat. Ann. §§111.84(1)(f), 111.81(6) (1974) (agency shop for state employees is negotiable, "fair share" service fee is the equivalent of union dues); Wis. Stat. Ann. §§111.70(2), 111.70(1)(h) (1974) (agency shop for municipal employees is negotiable, "fair share" service fee is the equivalent of union dues); *See Flood* v. *Bd. of Educ., Jt. School District No. 1,* 69 Wis. 2d 184, 230 N.W. 2d 711 (1974) (constitutionality of fair share provisions is a proper subject for judicial review);

DISTRICT OF COLUMBIA

Exec. Order No. 70-22[9], Comm'r of D.C., District Personnel Manual, ch. 25A §13 (1970) (agency shop for public employees is negotiable).

APPENDIX B
DFT BYLAWS, ARTICLE II

Section 1. Political Objections by Dissenters

Any person making dues payments, or service fee payments to the Union in lieu of dues under agency shop provisions in the Union's Collective Bargaining Agreement, shall have the right to object to the expenditure of his/her portion of such payments for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment. Such objections shall be made, if at all, by the objector individually notifying the Union President and Treasurer of his/her objection by registered or certified mail, during the period between September 1-15 of each year. Such objection, if any, shall be renewed each year in the same period in the same manner.

The approximate proportion of dues and service fees spent by the Union for such purposes shall be determined annually, after each fiscal year of the Union, by the Union's officers. Rebate of a pro-rated portion of his/her dues or service fees corresponding to such proportion shall thereafter be made to each individual who has timely filed a notice of objection, as provided above.

Section 2. Appeals

If an objector is dissatisfied with the proportional allocation that has been determined on the ground that it assertedly does not accurately reflect the expenditures of the Union in the defined area, an appeal may be taken by such person to the Union Executive Board within thirty (30) days following receipt of such rebate or receipt of notice of such allocation. The Executive Board shall render a decision on such appeal within thirty (30) days following its receipt. If the objector remains dissatisfied, he/she may

file an appeal therefrom to the membership by lodging the appeal with the President of the Union within thirty (30) days following receipt of the Executive Board decision, which appeal shall be heard at the next regular membership meeting of the Union or at a regular membership meeting which occurs within ninety (90) days thereafter.

If he/she is dissatisfied with the membership action, he/she may further appeal, within thirty (30) days following the decision of the membership, to the Review Panel as provided in Section 3.

Section 3. Review Panel

(a) In order to assure objective disposition of complaints about rebates of sums paid to the Union under dues or agency shop contract provisions, there shall be established a Review Panel composed of prominent disinterested citizens who are not a part of or employed by the American Federation of Teachers or its affiliates.

(b) The Review Panel shall consist of not more than five (5) members including the chairman. The Union President shall, with the approval of the Union Executive Board, designate the members including the chairman of the initial Review Panel. Thereafter, whenever a vacancy shall occur on the Review Panel, the vacancy shall be filled by the Union President from a list of names submitted by the remaining members of the Review Panel.

(c) The Review Panel shall have the authority and power to make final and binding decisions in rebate cases appealed to it under this Article.

(d) The Review Panel shall formulate such rules of procedure and establish such practices as it finds necessary to its proper functioning.

(e) The Review Panel shall submit to the Union Executive Board an annual report of its activities, which report shall contain a summary of all cases brought before the Review Panel during that year. Copies of the annual report shall be available upon request to all members and to all non-members subject to agency shop contract provisions.

(f) The reasonable and necessary expenses of the Review Panel shall be paid by the Union.